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IN THE

Supreme Court

OF THE 1559

United States

OCTOBER TERM, 1970

CIPRIANO D. ALONZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Cipriano D. Alonzo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment entered against him on March 9, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A, annexed hereto. The order of the District Court for the Northern District

of California upholding the arrest and search below is annexed hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1971. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code.

QUESTION PRESENTED

Whether, in a Prosecution in Federal Court for a violation of the Federal Narcotics Laws, the Court may apply the more liberal State Entry Requirements because the actual entry was made by a State officer engaged in a joint Federal-State narcotics raid, rather than the stricter requirements imposed upon Federal officers by 18 U.S.C. 3109 and this Court's decision in *Sabbath* v. *United States*, 391 U.S. 585?

STATUTES INVOLVED

Section 3109 of Title 18, United States Code provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Section 844 of the California Penal Code states:

> To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

STATEMENT OF THE CASE

Federal, State, and local narcotics officers participated in a joint investigation concerning the petitioner and others. Leading up to the petitioner's arrest, the drugs were purchased by a *federal* undercover agent; were taken to the office of the *Federal* Narcotics Bureau for safekeeping; were examined by a *federal* chemist, who testified in the *federal* prosecution for a violation of the *federal* narcotics laws. Four other federal agents participated in the investigation, but the entry into petitioner's home was made by state and local officers. This was the entry which the Court below held was authorized by Section 844 of the Penal Code of the State of California, citing *People* v. *Maddox*, 46 Cal. 2d 301, 294 P. 2d 6, *cert. denied*, 352 U.S. 858 (1956).

While the petitioner does not concede the correctness of the ruling that the entry and arrest were valid under state law, it is the broader ruling (and its implications) which we ask this Court to review.

REASONS FOR GRANTING THE WRIT

The Court of Appeals relied upon its prior decision in *Williams* v. *United States*, 273 F. 2d 781 (1959), wherein it was stated that:

> Since the activity of the officers which culminated in the return of the indictment was a joint federal-state enterprise, it is clear that the participation of federal officers makes the enterprise a federal one for purposes of prosecution for violations of federal law. *Lustig* v. *United States*, 1949, 338 U.S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819.
>
> 273 F. 2d at p. 790.

Notwithstanding this clear language, the Court applied California law to the arrest and entry, since the arrest was made by a state officer. In reaching this conclusion, the Court said:

> In the instant case, the federal narcotics agents participating in the enterprise did not exercise such authority [under 26 U.S.C.A. § 7607], but the arrest of Mrs. Williams was made by a state officer who was authorized to make such arrest by Section 844 of the Penal Code of the State of California. Since the enterprise was a federal one, the validity of the arrest must be measured by federal law if there is an applicable federal statute. If not, the validity of the arrest must be judged by state law.

* * * * *

> Our attention has been called to no applicable federal statute, although the government mildly suggests Title 26 § 7607. Clearly such statute gives authority to a federal narcotics agent to make an arrest without a warrant if he has reasonable ground to believe that the person to be arrested has committed or is committing violations of federal narcotics laws. The statute is silent as to the means or methods of making such arrests.
>
> 273 F. 2d, at p. 792

Obviously, the Court did not consider 18 U.S.C. § 3109 a federal law relating to "the means or methods of making such arrests". One authority has commented upon this problem:

> Interestingly enough, the Ninth Circuit has apparently handed down inconsistent decisions. In *Hopper* v. *United States* [267 F. 2d 904 (9 Cir. 1959)] and *Williams* v. *United States*, [273 F. 2d 781 (9 Cir. 1959)], Washington and California law were held respectively to govern the manner of entry in making an arrest. Both decisions explicitly referred to *Miller* [*Miller* v. *United States*, 357 U.S. 301, 78 S. Ct. 1190 (1958)] as District of Columbia law. However, in *Munoz* v. *United States*, [325 F. 2d 23 (9 Cir. 1963)], the court squarely held an arrest by federal agents without a warrant unlawful under section 3109 as interpreted by *Miller*.

Blakely, *The Rule of Announcement and Unlawful Entry: Miller* v. *United States and Ker* v. *California*, 112 Pa. L.R. 499, 527 (1964).

The Ninth Circuit was later to recognize the possible effect this Court's decision in *Miller* v. *United States*, 357 U.S. 301, 78 S. Ct. 1190, has upon the rule announced in *United States* v. *Di Re*, 332 U.S. 581, 68 S. Ct. 222 (1948) and followed in *Johnson* v. *United States*, 333 U.S. 10, 68 S. Ct. 367 (1948). In *Sabbath* v. *United States*, 380 F. 2d 108, 110, [reversed 391 U.S. 585] the Court said:

> It is not clear just what law sets the standards which govern an officer's entry into a dwelling for the purpose of making an arrest. When the arrest is made by a state officer for a federal offense, it has been said that the arrest is to be tested by the law of the state [*Miller* v. *United States* (cite), may cast some doubt upon this language even as to state officers. See the dissenting opinion. (note 4)]

In *Sabbath*, the Court of Appeals did apply 18 U.S.C. § 3109 as a "federal law relating to the means or methods of making such arrests" by virtue of this Court's decision in *Miller*, which it considered based upon section 3109. 380 F. 2d, at p. 111, note 7.

If then, joint federal-state enterprises are to be governed by federal law, the Court below erred in applying state standards, such as Penal Code § 844 as

enlarged by *People* v. *Maddox*, 46 Cal. 2d 301, 294 P. 2d 6, *certiorari denied*, 352 U.S. 858, 77 S. Ct. 81 (1956). The test for the validity of the entry should be one of federal law, "neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed". *Elkins* v. *United States*, 364 U.S. 206, 224, 80 S. Ct. 1437, 1447 (1960).

This Court's decision in *Ker* v. *California*, 374 U.S. 23, 83 S. Ct. 1623 (1963), while dealing with a state's treatment of entries by state officers under state law, suggests the difficulties in the delicate area of federal-state cooperation, where it is difficult to anticipate whether state, federal or constitutional rules apply. If, as Justice Brennan suggested, unannounced police entries are governed by uniform Fourth Amendment standards, the states and the federal government can adjust their practices accordingly.

The importance of the question of unannounced entries cannot be minimized, especially in light of recent federal legislation permitting entries to execute search warrants in drug cases where probable cause is shown. Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law 91-513, 84 Stat. 1236, § 509(b). May state officers enlist the aid of a federal drug agent to procure a "no-knock" warrant, thereby evading stricter state standards? Does *Miller* impliedly extend § 509(b) to drug *arrests*, with or without warrants? Is § 509(b) a limitation on joint fed-

eral-state narcotics investigations? If, as the Court below held, in a joint federal-state enterprise, the entry is controlled by state law if a state officer makes the arrest, a "no-knock" warrant in the hands of a cooperating federal agent is worthless. [See an extensive discussion of the problems in *Announcement in Police Entries*, 80 Yale L.J. 139 (1970).]

The decision below was based upon a prior decision of the Ninth Circuit which is of questionable validity. The Court in *Williams* ignored the existence of 18 U.S.C. § 3109 as applied to entries to arrest. In the instant case, as in *Williams*, the investigation was primarily federal, with cooperation from state officers. The only significant step in the entire case, from initial contact until ultimate conviction, was the entry and arrest by state officers. If this Court's holding in *Lustig*, supra, has any vitality remaining, federal law must apply to this entry and arrest.

CONCLUSIONS

It is respectfully submitted that the judgment below is based upon the existing uncertainty of the law with respect to entries to arrest, resulting from this Court's decisions in *Miller* v. *United States*, supra, *Ker* v. *California*, supra, and *Wong Sun* v. *United States*, 371 U.S. 471, 83 S. Ct. 407 (1963). There is need for clarification in the area of state-federal enforcement, especially in light of current legislation and efforts at coordinating crime control through co-

operative programs at every level of government. It is imperative that the courts, and the enforcement personnel that must bring their cases before them, know with certainty which laws apply to a given situation. A sense of uncertainty permeates the decisions of the lower courts. The decision below adds to that uncertainty, and presents the vehicle for crystalization of a workable rule by this Court. For these reasons, the writ of certiorari should be granted.

Respectfully submitted,

GOLDE, STRELLIS & HALL
STANLEY P. GOLDE
SPENCER W. STRELLIS
Counsel for Petitioner

PROOF OF SERVICE

I, Stanley P. Golde, one of the attorneys for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit as follows:

> Five copies upon Hon. Erwin Grisworld, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.
>
> Three copies upon James L. Browning, United States Attorney, 450 Golden Gate Avenue, San Francisco, California 94102.

All said copies were deposited in the United States mail at Oakland, California, with first class postage prepaid, addressed as above, this 1st day of April, 1971.

Dated this 1st day of April, 1971.

STANLEY P. GOLDE

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CIPRIANO D. ALONZO,
Defendant and Appellant,

v.

UNITED STATES OF AMERICA,
Plaintiff and Appellee.

No. 25,920

[March 9, 1971]

On Appeal from the United States District Court for the Northern District of California

Before: KOELSCH and TRASK, Circuit Judges, and BYRNE,* District Judge.

BYRNE, District Judge:

The appellant Alonzo, James Jackson and Dorothy Cox were indicted for violation of the federal narcotics laws. They were tried and convicted by a jury. Only Alonzo's conviction of the one count with which he was charged pursuant to § 174 Title 21 U.S.C., is relevant to this appeal.

* Honorable William M. Byrne, United States District Judge, Los Angeles, California, sitting by designation.

On September 18, 1968, George Heard, an undercover narcotics agent, met James Jackson at Jackson's residence and purchased an ounce of heroin for which he paid $400.00. A week later he made a similar purchase.

Heard telephoned Jackson at his apartment on October 2, 1968, and asked if he could get "six pieces". Jackson stated that "his man was out of town", but that he could supply Heard with a portion of the desired amount and he "would get the other later". Heard rejected this arrangement, stating that he wanted the entire amount at one time and that he would contact Jackson in a few days.

On October 4, 1968, Heard again called Jackson who told him his "man" was back, that he was on his way over and would be there by the time Heard arrived. When Heard arrived at Jackson's apartment, he was told by Jackson that his "man" would bring the drugs over, since he was a short distance away and that he could get him any amount. About 11:35 A.M. Jackson answered the phone and spoke to a man he identified as "Pete" and asked him to bring "the six pieces". Shortly thereafter appellant arrived at Jackson's apartment and was introduced to Heard as "Pete". "Pete" told Jackson that he had not brought "the six pieces" up to the apartment because "he didn't like the way it looked outside". At appellant's suggestion, the men decided to go to Alonzo's house and com-

plete the transaction there. Appellant and Jackson drove to the former's house together; Heard followed in his own car.

When the men arrived at Alonzo's house, they proceeded to the kitchen where appellant requested the "package" from Jackson who removed a brown bag from his coat pocket and handed it to appellant. Alonzo took a piece of newspaper and spread it out on the table, removed two rubber balloons from the brown bag and emptied the heroin from the balloons onto the newspaper. He then proceeded to mix the heroin with milk sugar, commenting that the heroin had never been cut before.

At this point, Heard left the room and telephoned the operator at the California Bureau of Narcotics Enforcement. Heard told the operator to make radio contact with agents who had placed Alonzo's house under surveillance and tell them that he "had the evidence inside" and that arrests should be made.

Approximately three minutes after making this telephone call, the agent "heard knocking and voices at the front of the house, and the officers entered and placed them both under arrest".

The first contention of error is that the entry into the premises and the seizure of the heroin was unlawful and therefore the introduction of the narcotics seized by the agents should have been suppressed.

California Agent Van Raam received the radio communication which had been instigated by Heard. Immediately after receiving this information Van Raam and the other officers congregated in front of appellant's house. As they had anticipated making the arrest at Jackson's home, they obviously did not have a warrant to search Alonzo's house.

The entry and the arrest were made by State narcotics officers and members of the San Francisco Police Department. Agent Elsberg knocked at the door while Officer Morrow of the San Francisco Police Department yelled "Police Officers, we are here on a narcotic raid." The door remained closed, and Morrow testified he heard running and barking dogs. He then ordered Elsberg to kick the door in. A period of 15 to 20 seconds had elapsed from Elsberg's initial knock.

Morrow testified that one of the factors which led to the decision to forcibly enter appellant's residence was his concern for Heard's safety. The officer attributed his concern to information given to him that Alonzo was Jackson's "source" and that "he was generally armed". His concern was also due to the barking of Alonzo's Doberman pinschers and the fact that Heard did not have any money on his person.

There can be no dispute as to the existence of probable cause for the making of the arrests. The only question relates to whether the arrests were lawfully executed. Heard was a federal narcotics agent, but the

arrest of Alonzo was made by a state officer who was authorized to make such arrest by Section 844 of the Penal Code of the State of California.[1]

This Penal Code Section was construed by the Supreme Court of the State of California in *People* v. *Maddox*, 46 Cal. 2d 301, 294 P.2d 6, *cert. den.* 352 U.S. 858 (1956). In that case, the arrest was made in a private dwelling without a warrant by a state officer who had reasonable grounds for believing that the narcotic laws were being violated. The officer sought entrance to the home by knocking. He then kicked open the door and arrested the defendant. The court stated:

> ". . . since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose . . . We conclude therefore that when there is reasonable cause to make an arrest and search and the facts known to him before his entry are not inconsistent with a good faith belief on the part of the officer that compliance with section 844 is excused, his failure to comply with the formal requirements of that section

[1] California Penal Code Section 844 provides:
"To make an arrest, a private person, if the offense be a felony, and in all cases a peace-officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

> does not justify the exclusion of the evidence he obtains."

See also, *Williams* v. *United States*, 273 F.2d 781 (1959).

In the ordinary case, officers might be expected to wait more than 15 to 20 seconds after demanding admittance, but under the circumstances which existed here, including the perilous position of Agent Heard, it was of paramount importance that the entry be made as quickly as possible. The district court Judge properly denied the motion to suppress the evidence.

Appellant asserts that the trial court incorrectly instructed the jury regarding the presumption provided in 21 U.S.C. § 174.[2] According to Alonzo. "The instructions left the impression that once possession was proved beyond a reasonable doubt, conviction should follow." The carefully selected portion of the instruction the appellant has asked this court to consider does not accurately portray Judge Layton's instructions. Not only did the court preface its instruction relating to the statutory presumption by spelling out the requirements "in order to establish the offense", but it informed the jury that the presumption "does not change the fundamental rule that a defendant is presumed to be innocent until the government

[2] 21 U.S.C. § 174 provides the following presumption:

". . . Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

has met its burden of proving beyond a reasonable doubt every essential element of the offense charged against him". These instructions are virtually identical with those approved by this court in *United States* v. *Parker*, 428 F.2d 488 (CA 9, 1970).

Affirmed.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff*, v. JAMES E. JACKSON, CIPRIANO ALONZO, and DOROTHY COX, *Defendants.*	**Criminal No. 42342**

ORDER

AND NOW, to wit, this 3rd day of March, 1970, it appearing that the defendant, Cipriano Alonzo, has moved for an acquittal or in the alternative for a new trial on the grounds that:

(1) The statutory presumptions in 21 U.S.C. §174 are Constitutionally invalid;

(2) Evidence was introduced against the defendant which was seized in violation of the Fourth Amendment and 18 U.S.C. § 3109;

(3) The Court erred in its instructions to the jury on possession, the burden of proof, and on the inference which could be drawn from the possession of the narcotic drug;

AND this motion having been considered on briefs submitted by plaintiff and defendant;

AND it appearing that the United States Supreme Court has upheld the statutory presumptions of 21 U.S.C. § 174 in *Turner* v. *United States*, 396 U.S. 642, 38 U.S.L.W. 3101 (1970);

AND it appearing that, even assuming that 18 U.S.C. § 3109 were not complied with, there were "exigent circumstances" which would excuse any non-compliance, *Sabbeth* v. *United States*, 391 U.S. 585, 591 (1968); *Miller* v. *United States*, 357 U.S. 301, 309 (1958), in that:

(1) The agents had information that the defendant was armed;

(2) The agents had reasonable grounds to fear that the federal narcotics agent inside the defendant's house was in danger because he did not have sufficient money to purchase the heroin;

(3) The agents had made a previous investigation of the defendant and wished to arrest the defendant in possession of the narcotics;

(4) The agents had announced their presence and were reasonably afraid that this warning, combined with the barking of the defendant's dogs, might lead to the destruction of the heroin;

And it appearing that the instructions given to the jury were proper and not confusing,

IT IS ORDERED that the defendant's motion be and the same is herewith denied.

CALEB LAYTON III
U.S.D.J.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1559

CIPRIANO D. ALONZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of narcotics violations under 21 U.S.C. 174. He thereafter moved for acquittal or a new trial, urging, *inter alia,* that the method of entry by state officers into his home at the time of his arrest violated the Fourth Amendment. The district court denied the motion (Pet. App. B) and the court of appeals affirmed (Pet. App. A).

The facts are set forth in the opinion of the court of appeals. They show that on October 4, 1968, federal undercover narcotics agent Heard, having previously made two purchases of heroin from one Jackson, telephoned Jackson regarding a further purchase of six

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"pieces" of heroin. Jackson told Heard that his "man" was available and would be there by the time Heard arrived. When Heard arrived at Jackson's apartment, the latter told him that his "man" was a short distance away and would bring the drugs. Jackson thereafter answered the telephone and spoke to someone he called "Pete"; he asked "Pete" to bring the six "pieces". Petitioner arrived shortly thereafter and was introduced to Heard as "Pete". Petitioner told Heard he had not brought the heroin to the apartment because he "didn't like the way it looked outside". At petitioner's suggestion, it was decided to complete the transaction at petitioner's residence.

After driving to petitioner's house,[1] the three men went to the kitchen where petitioner requested Jackson to furnish him with the "package". Jackson removed a brown paper bag from his coat pocket and handed it to petitioner. Petitioner took two rubber balloons containing heroin from the bag and emptied the drug onto a piece of newspaper. He then mixed the heroin with milk sugar, commenting that it had not been "cut" before.

At this point Heard left the room and telephoned the California Bureau of Narcotics. He told the operator who answered to radio State agents, who had been watching petitioner's home, that the evidence was inside and that they should make the arrests.

The arrests were made by State narcotics officers and San Francisco police some three minutes later. Agent Elsberg knocked at the door while police officer

[1] Petitioner and Jackson went in one car; Heard followed in his own vehicle.

Morrow yelled: "Police Officers, we are here on a narcotic raid." The door remained closed. Morrow testified he heard running and the barking of petitioner's dogs. After about fifteen or twenty seconds, Morrow ordered Elsberg to kick in the door; this was done. Morrow testified that his decision to enter the residence forcibly was based on a concern for Heard's safety since the latter did not have any money to pay for the drugs. Morrow further stated that he had received information that petitioner was "generally armed".

The court of appeals held that under Section 844 of the California Penal Code,[2] as interpreted by the California Supreme Court in *People* v. *Maddox*, 46 Cal. 2d 301, 294 P. 2d 6, certiorari denied, 352 U.S. 858, the method of entry of the State officers was proper since exigent circumstances existed justifying the forcible entry within 15 to 20 seconds after the announcement of purpose and authority.

Petitioner contends that the validity of the entry should have been determined under the allegedly more rigorous federal standards laid down by 18 U.S.C. 3109 (set forth at Pet. 2), since the entry was for the purpose of making an arrest for a federal crime. However, the choice of law is without significance in this case, since the facts show that under either the federal or state statute the forcible entry in this case was justified. The officers did announce their purpose and

[2] Section 844 provides in pertinent part that a peace officer "may break open the door or window of a house in which the person to be arrested is * * * after having demanded admittance and explained the purpose for which admittance is desired."

authority; the only issue is whether they waited long enough before breaking down the door. It is clear that they did give the reasonable basis for apprehension that the officer inside the home was in danger. See *Ker* v. *California,* 374 U.S. 23, 39–40; *id.* at 55 (opinion of Brennan, J.); *Sabbath* v. *United States,* 391 U.S. 585, 591 n. 8.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

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